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THE TRIAL

OF

THE RHODE ISLAND JUDGES.

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AN EPISODE TOUCHING CURRENCY AND CONSTITUTIONAL LAW.

A DISSERTATION

BY

JOHN WINSLOW.

READ BEFORE

THE BROOKLYN REPUBLICAN LEAGUE

AND

THE RHODE ISLAND HISTORICAL SOCIETY.

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NOTE.

When the dissertation herewith published on the trial of the Rhode Island Judges in 1786, was read in Brooklyn, in September last, it was not supposed it would attract special attention elsewhere. The author soon learned however that the paper had excited considerable interest beyond the limits of our Brooklyn community, especially in Rhode Island. After its appearance in the Brooklyn Press, it soon became the subject of editorial comment and communications in several newspapers in Newport, Providence and other places in that State.

The following editorial subjoined, as showing the interest felt in Rhode Island, appeared in the *Providence Journal* of the 7th of October last.

A BIT OF RHODE ISLAND HISTORY.

At a meeting of the Brooklyn Republican League, a few evenings ago, the Hon. John Winslow, its President, read an elaborate and scholarly paper on that interesting episode in the constitutional history of our State, the trial of the Rhode Island judges, which took place in November, 1786. That trial, so significant in the history of jurisprudence, is of course familiar to all lawyers as the outcome of the famous case of Trevett vs. Wheeden. But the great majority of our citizens are not, we imagine, so well acquainted with the incident as they ought to be, not only because of its importance as a matter of local history, but more because of the light it throws on the sad condition of affairs at the close of the Revolution and upon two great heresies, one of which, governmental in its nature, has since passed out of the list of debatable questions, but the other, of economic bearing, still shows weak spasms of revival as a living issue. It is unnecessary to go into the deiails of that history, which any one, by a little research, can obtain, in more or less complete form, from various sources. Mr. Winslow, in his paper, admirably summarized the events, both prior and subsequent to the trial, and pointed out their significance. It is pleasant to find men in other States giving such careful attention to Rhode Island history—a history that, in comparison with the more pretentious annals of larger communities, is sometimes held to be rather insignificant, but which in reality includes the working out of some of the most fundamental principles of modern government and society. Everybody acknowledges the part Rhode Island has played in reaching sound theories as to the relations of church and State. But not every one is awake to the lessons it offers on other matters of scarcely less importance. And it is well, on occasion, even for Rhode Island people, to recur to incidents like the one discussed by the Brooklyn League, that by refreshing the memory

they may not fall away from the fundamental principles these events illustrate.

To understand the forces at work which brought about this remarkable trial, it is only needful to recall the general financial condition of the country at that time. The seven years' contest with Great Britain had left the people in absolute poverty. In the general want and discontent a thousand wild schemes were broached and seriously discussed; and, among the rest, a frantic paper money rage set in. Legislatures, always the first to yield to popular folly and clamor, undertook to make all men rich by issuing unlimited quantities of flat currency. In every State grievous disaster followed, but here in Rhode Island the derangement of industry was the more serious from the fierceness with which the economic lunacy raged. No sooner had the Legislature issued a half million of promises to pay when, with a rush that threw all business from its base, the value of money went down and prices went up under the inevitable law of financial gravitation. But this by no means convinced the economic quacks from the country towns—Foster, Gloserter and the rest—of the error of their efforts. Again they rallied to the support of their wild schemes, and secured from a time-serving Legislature a law compelling, under heavy penalty, every citizen to receive the paper at specie par value. If any one violated this ridiculous statute he was to be tried without jury by a special court, from whose judgment no appeal could be taken. Under this law arose the case of Travett vs. Wheeden, the defendant in which, a Newport butcher, had refused to receive paper money as the equivalent of specie. At this point the bearing of the matter on finance ceases. The paper-issue laws were soon after repealed, and better knowledge on currency problems came to prevail. The Rhode Island experiences of 1786 proved to our people so conclusively that laws, though piled above one another mountain high, cannot create intrinsic value nor transmute paper into gold, that the paper money heresy has never since obtained any considerable adherence in our State.

But out of this case against Wheeden arose another question of extreme importance. His counsel, Mr. Varnum, rested the defence in part on the unconstitutionality of the law under which he was arrested, because it deprived the accused of a jury trial and the Supreme Court of the power of revision. The decision of the Court, that the complaint was not cognizable before it, was understood to mean that in its judgment the act was unconstitutional and void. Strange as it seems to the present generation, at that time the right of a court to declare an act void because repugnant to the Constitution—a principle on which our system of government is now acknowledged everywhere to rest—was very strongly denied. Immediately on convening, therefore, the Legislature put the judges on trial before it for the decision they had made; and the extraordinary scene, almost inconceivable by a modern American mind, was presented of a

law-making body trying the interpreters of those laws for an honest expression of opinion upon a law question brought before them in due course of procedure. It was a singular and exciting trial; the ablest lawyers of the State participated in it, and some fine examples of legal eloquence and learning were exhibited. The result of it was that the Legislature decided that though the judges had given no satisfactory reason for their judgment in Trevett vs. Wheeden, yet as they were not charged with criminality, they should not be removed from office. The question of the real relations between the legislative and judicial departments of government was thus left unsettled. Mr. Winslow, however, traces in his paper the subsequent course of the debate in the United States Courts until it was finally decided forever by Chief Justice Marshall. But this part of the controversy is not specially connected with Rhode Island history.

His paper, which seems to have aroused much interest among his Brooklyn hearers, showed such familiarity with Rhode Island affairs as suggests that he might find something of interest, on this or a similar theme, to say before our own Historical Society at some of its coming meetings. The paper also suggests how valuable a scholarly and exhausive constitutional history of our State could be made. By leaving aside the mere externalities, the dramatic and legendary incidents, the gossip and traditions of the past, and confining itself purely to the elucidation of Rhode Island history as the evolution of the great principles of government, such a book would be vastly instructive. It would embrace many such momentous questions as Mr. Winslow touched upon, and would show, as no history yet written fully shows, how through trouble and turmoil we have gradually worked ourselves out to "liberty regulated by law." Who will write it?

This was followed by a cordial invitation to the author to read the paper before the Rhode Island Historical Society, in Providence, R. I. The invitation was accepted and the paper was read before that Society on the 16th of November last.

With some kind words of appreciation and commendation of the paper on putting a motion for a vote of thanks, Professor William Gammell, the accomplished President of the Society, gave some interesting reminiscences relating to the trial and especially to Chief Justice Howell's connection with Brown University.

J. W.

Brooklyn, N. Y.,
February 22, 1887.

DISSERTATION.

Though the famous trial to which I shall call your attention occurred as long ago as 1786, it brought into prominence two subjects which are as full of interest now as then. At the time of the trial the right of a Court of record to determine a Legislative Act, unconstitutional and therefore void, was vigorously denied. This trial also discloses the fact that wild notions touching the ability of Governments to create paper money and give it abiding value, irrespective of their ability to redeem it, were more prevalent at the close of the Revolution than at the close of our late Civil War. It is chiefly because this trial brings up these two great topics, vital now as then, that I call your attention to it, with a view in some measure to discuss the questions the trial involved.

Our subject is also not without interest in many minor incidents showing the condition of the people and of our National and State Governments at the close of the Revolution. That the trial of the Judges and the litigation that led to it brought up the consideration of economic and constitutional questions in lively array will soon be apparent. The trial of the Rhode Island Judges commenced in November 2, 1786, in Providence, Rhode Island, and was a trial by the Legislature. A reference here to the general condition of the country at that time will help us to better understand the influences and forces that were at work which brought about this remarkable trial of the Judges. The trial was an outcome of the case of Trevett vs. Wheeden.

The condition of the country at the close of the American Revolution was one of general poverty and distress. The few exceptions only seemed to exasperate the great body of the people who were patriotic and poor. The protracted contest of seven years with Great Britain, had exhausted the country and when peace came the poverty of the people was more apparent than before. The general discontent threatened to bring serious

internal dissensions that must inevitably still further impoverish the people.

The army was unpaid and discontented, and when it returned home it was only to find a population dejected and cast down by burdensome taxes with no means to pay them. In this time of general want and discontent, political quackery as usual came to the front, and hinted for a remedy, like the Anarchists of our time, in a division of property and a defiance of economic principle.

Among the maritime towns there were men of fortune who had made money as importing merchants. These were the objects of many bitter threats and attacks. It is said they were sending money out of the country for imported goods and their display of wealth served to deepen the discontent of the people at large. The long war of the Revolution had destroyed the business of the country. The farmers were poor and the carrying trade had suffered much. British ships had kept the fishermen away from the fisheries. It is difficult in the little time that can be given to this branch of our subject to adequately describe the deplorable condition of the country at this time. The suffering was so wide spread that desperate measures of supposed relief were entertained by the several Legislatures. Where they were enacted they proved failures. Where they were rejected rebellious plans were set on foot. Shay's rebellion, whose chief centre was in Massachusetts, though it reached New Hampshire, Vermont and Rhode Island in some of its operations, was an outcome of the general distress. It made war upon the Courts and for a time stopped them by armed force, on the ground that they were assisting the collection of taxes and maintaining law and order. Boycotting in various forms reared its feeble head and figured as a transient remedy. The paper money rage set in, and because of it, wild visions of means and even wealth become common. Notwithstanding the sore experience of Congress and the people with Continental money, so called—an inconvertable paper currency—the craze was, to once more enter upon a work never deputed to human hands—the work of making something out of nothing. One of the incidents of the situation was trade by barter, which in the end impeded trade. The scarcity of a sound currency was asserted when the noted Isaiah Thomas, then editor of the

"Worcester Spy," announced that he would take his pay for subscriptions in salt pork.

It is interesting to observe how the different States dealt with the situation. In most of them the legislation was rash and desperate. Connecticut and Delaware did not become dazed. North Carolina went in strong and issued a large amount of paper. It got it into circulation in buying tobacco at double its specie value. But this scheme came to grief and the paper somehow would go far below par. New Jersey tried the issue of half a million, to be a legal tender for business payments. But this State was crippled in her enterprise in a special way. Her business men dealt largely with merchants of the two important cities of Philadelphia and New York. These merchants refused the Jersey article, and so the money soon gravitated downward. The two Maritime States that suffered the most by the destruction of the carrying trade by the British in the Revolution were Massachusetts and Rhode Island. The extremists got control in the latter State, as we shall soon see. In Massachusetts the contention was great, but the extremists did not have their own way to their satisfaction. The outcome there was Shay's Rebellion, which brought armed men into conflict with the authorities in various parts of that and adjoining States. South Carolina tried her hand at paper issues, but her people soon refused to take the paper at par. This aroused the ire of the Legislature and of the quacks generally, and boycotts and houseburning were threatened. Georgia attempted coercion and passed penal laws against all who refused to receive as money the promissory notes of a Bankrupt State. It was found after a short experience, there as elsewhere, that the forcing acts were only forcible in forcing the shinplasters downward. Virginia tried some experiments, but the better sense of her people respected the advise of her leading statesmen, and the experiments were abandoned. Pennsylvania issued a million in 1785, by a carefully guarded law, requiring mortgages of takers of the issue, but, in spite of all precautions, the issue was dishonored by the people and failed. New York boldly issued a million, and soon reached a simular result under the law of financial gravitation that beset all the paper issues of the period.

In 1786 the paper party got control of the Legislature of Rhode

Island. Hence the case of Trevett vs. Wheeden and the subsequent trial of the Judges. The impoverished farmers clamored for paper relief. The merchants opposed and declared it delusive quackery. The merchants said that the people suffered because of the general poverty and the want of money of intrinsic value or its equivalent —a redeemable currency. Fiat money was not wanted because it did not and could not fulfil the office of stable money. Then as now, the currency question, one of the most intricate in political economy, was assaulted and muddled by ignorance and by demagogues, to the great damage of the people. The Legislature, however, insisted and issued a half million of promises to pay. The plan was to loan chiefly to the farmers for mortages of their farms of twice the amount in value. No sooner was the issue made than the inevitable financial law of gravitation was seen and felt on every side. Prices went up, which is only another way of saying that paper went down. The merchants were denounced as obstinate, and the real cause of the decline of the issue was blindly ignored. The economic quacks rallied and had a law passed compelling everybody to take the paper at specie par value. This paralyzed trade still more, and increased the excitement. Town meetings—the favorite New England forum—were held, and many unwise things were said in hot debate. Street corner arguments and fights were not uncommon in the large towns. The State was thus divided by two parties, one called the hard money party, the other the paper money party. At last the question of the legality of coercive legislation to enforce the circulation of the paper issue, was suddenly brought into conrt in the case of Trevett vs. Wheeden.

The case arose from a statute providing that if any person refused to receive any such paper issue as the equivalent of coin, and as a lawful tender for all debts, the debt was to be forever barred.

No time was fixed for the redemption of the paper. A little later another act was passed, which after referring to the difficulties that had sprung up in attempts to enforce previous legislation, provided that all who sought to depreciate or discourage the passing of the paper bills, should for the first offence forfeit it and pay the sum of 100 pounds and be rendered incapable of being elected to any office of honor, trust, or profit, within the State. Here was a thrust at a very lively instinct of the American Citizen—a denial of the right to be elected to an office.

The failure of this measure did not convince its supporters that legislation though piled mountain high could not change intrinsic value, nor create confidence, nor transmute paper into gold. It was found impossible to create and maintain confidence in a worthless paper issue. But the Legislature persisted, and in August, 1786, passed another extraordinary law. This law, after reciting the necessity of having penal laws followed up by immediate punishment, provided that offenders, that is, persons who refused to receive such bills as equal to coin, should be liable to complaint and arrest. The offender must appear within three days, before a special court, and there stand his trial, without a jury. If convicted, the offender must pay the penalty, or go to jail. This judgment must be final and conclusive, and without appeal. No delay or injunction should in any case be prayed for, allowed or granted. How this denial of a right to apply for an injunction must have stirred the lawyers of that day!

It was under this law that John Trevett, of Newport, in September, 1786, made his complaint against John Wheeden, a butcher. Trevett walked down the street one morning, in Newport, and bought of Wheeden some meat, tendering in payment bills emitted in May preceding, by the State of Rhode Island. The butcher thought his meat nearer par value than the paper, and refused to receive it. A complaint was made before Judge Mumford, of the Superior Court, where the defendant appeared and pleaded in part that the act was unconstitutional because it deprived the Supreme Court of the power of revision, and because it deprived the accused of a trial by jury. The case was heard in September, 1786, before Judges Mumford, Hazard, Tillinghast and Howell. Mr. Varnum and Mr. Marchant, eminent counsellors, defended. Varnum stood high as an able lawyer and as a citizen of great influence. He had been a General in the Revolution and also a member of the Continental Congress.

In appearing for Wheeden, Mr. Varnum represented his own views as well as the welfare of his client, which it is said is not always the case. His argument, which time will not permit me to rehearse, was regarded as able and conclusive. Mr. Varnum said, his client was called upon to answer criminally, for refusing to sell his beef "for four pence the pound," when it cost six pence upon

the hoof. I need not say that in the course of his argument Magna Charta and Blackstone, and the charter granted by King Charles the Second, and Vattel, were largely drawn on as illustrated by the bill of rights :

The counsellor exclaimed, "Have the Judges a power to repeal, to amend, to alter laws, or to make new laws? God forbid! In that case they would become legislators. Have the legislators power to direct the Judges how they should determine upon the laws already made? God forbid! In that case they would become Judges. The true distinction lies in this, that the Legislature have the uncontrollable power of making laws not repugnant to the Constitution; the judiciary have the sole power of judging of those laws and are bound to execute; but cannot admit any act of the legislature as law, which is against the Constitution."

Strange as it may now seem, the right of a court to declare an Act void, because repugnant to the Constitution, though now well settled, was in 1786 denied, and as we shall see, stoutly questioned for several years until finally decided by the Supreme Court of the United States, by an opinion written by Chief Justice Marshall.

The Rhode Island Court decided that the complaint was not cognizable before them. This was understood to mean that in the judgment of the Court the Act was unconstitutional and void. The decision caused an outbreak of great excitement. The sound currency men were glad and their adversaries were not pleased. The Legislature was indignant beyond expression. The General Assembly was speedily convened in extraordinary session on the first Monday in October, 1786, by a warrant issued by Governor John Collins and the Judges were put on trial on the 2nd day of November, 1786, for declaring an Act of the Supreme Legislature of the State unconstitutional, and so absolutely void. It is not worth while nor practicable within the limits of this paper to recite fully all that took place at this extraordinary hearing or trial. The Assembly declared that the aforesaid judgment was unprecedented in the State and may tend directly to abolish the legislative authority thereof. Judge Howell made an elaborate and learned speech of six hours and denied that the Judges were accountable to that tribunal, for the reasons of their judgment, though he stated them very fully.

NOTE.—Judge David Howell was born in New Jersey, January 1, 1747, and graduated at Princeton, in 1766. He was induced to remove to Rhode Island by Rev. James Manning, D.D., who was also a graduate of Princeton. Dr. Manning was the chief founder and first President of Brown University, then Rhode Island College. This appears in a cordial letter of advice, written by Dr. Manning, dated at Warren, R. I., July 14, 1766. In this letter Dr. Manning tells his friend, "I was glad to find that you had not determined upon any place of employment, because I was desirous that you should make a visit to these parts before your settlement." Without giving a positive opinion Dr. Manning adds, "however, at present it appears to me that you cannot do better than to visit Rhode Island," and further "a taste for learning is greatly upon the increase in this colony, and I would advise you to see me before you engage elsewhere."

Mr. Howell accepted this invitation and soon became associated with Dr. Manning as tutor in the College, then located at Warren.

He was afterwards Professor of Mathematics and Natural Philosophy until the interruption of the College by the war of the Revolution. He was also a Professor of Law at the College and practiced law in Providence. He was fifty-two years a member of the board of Fellows, and many years Secretary of the Corporation.

He was for some years Attorney General of the State, a Judge and also a delegate to the Continential Congress from 1782 to 1785, and subsequently was appoieted Commissioner to settle the eastern boundary of the United States; he was District Attorney, and from 1812 to his death in 1824 was district Judge for Rhode Island. Judge Howell was a fine classical scholar and an effective political writer. He was largely identified with the life and progress of Brown University. It will thus be seen that when the Rhode Island Assembly encountered him in controversy it met an opponent of high character, of large attainments, and as the debate and result showed, a man of nerve and courage. Neither of the judges associated with him in the case of Trevett vs. Wheeden was a lawyer.

A portrait of Judge Howell, painted by the famous artist Trumbull is in the Capitol at Washington, and a copy of this portrait has been recently procured by a great-grand daughter of Judge Howell and will soon be presented to Brown University. A more graceful and appropriate gift could not be made to that institution of learning with which Judge Howell's life and work were so closely and honorably associated.

Baron Montesquieu was quoted, where he says, in his "Spirit of Laws" that "there is no liberty, if the Judiciary power be not separated from the legislative and executive."

Judges Tillinghast and Hazard followed Judge Howell. Judge Tillinghast said, "The opinion I gave upon the trial was dictated by the energy of truth: I thought it right—I still think so. Be it as it may, we derived our understanding from the Almighty, and to him only are we accountable for our judgment."

After the defence made of the Judges an earnest debate followed in the Assembly, on the question "whether the Judges in support of their judgment had given reasons satisfactory to the Assembly?" It was decided in the negative. A motion was then made to dismiss the Judges from office. Pending this the Judges sent in a memorial, reciting the circumstances so far and, asking for a

hearing on this motion. This was granted. Here now we have presented the spectacle of a Legislature proposing to remove Judges for an honest expression of opinion on a law question before them in due course of procedure.

The memorial and Mr. Varnum's argument evidently made a deep impression on the Assembly. The debate became calmer and more rational. A motion was adopted that the opinion of the Attorney General be taken, and that of other eminent lawyers, whether the Assembly could constitutionally suspend or remove the Judges, without a previous charge, followed by due process, trial and conviction. William Channing, who was the Attorney General of the State, was the father of the eminent William Ellery Channing, D.D. The Attorney General told the Assembly he was happy in the conviction that the Judges had acted with candor and uprightness, and in his opinion in accordance with the principles of constitutional law; further, that the Judges could not lawfully be suspended or removed from office for a mere matter of opinion, without a charge of criminality. Other leading counsel gave similar advice. It was then resolved by the Assembly, that the Judges had given no satisfactory reasons for their judgment in the case of Trevett vs. Wheeden; but as they were not charged with criminality, in giving their judgment, it was voted that they be discharged from attendance upon the Assembly on that account. The paper issue laws which had so fermented Rhode Island were soon after repealed, and a better conception of the true principles of government touching currency began to prevail. In our estimate of this legislative procedure, we must remember that no work on political economy was at this time known. Adam Smith's treastise on the Wealth of Nations appeared in 1776, but had not, it is apparent, dawned upon the Rhode Island Assembly, nor much upon the rest of mankind as late as 1786.

Indeed we are told that as late as 1820, the Professor of History, in Cambridge, England, publicly lamented that there was no work upon this important subject he could give his class.

This violent controversy discloses two salient and creditable features, worthy, in this connection, of our grateful notice. First, that the Judges had the intelligent courage to stand for a principle, which though questioned then, has since become the palladium of our safety and our liberty, against legislative encroachment.

Second; that the General Assembly, beset as it was by the distress of the period and the fanaticism it produced, finally had the good sense to listen to the voice of reason and justice, and so abandon its absurd incogitant attack upon the Judiciary.

Thus we see to what extremes this spurious money craze carried the people when suffering from poverty and the want of stable money. Currency in whatever form issued, to be valuable and command confidence, must have either intrinsic value, or the government that issues it must have the unquestioned ability to redeem it at par. In so far as currency falls short, if in coin of such intrinsic value, if in paper, of such ability to honor and redeem, so far it will find its just level on a line below par. As illustrations of this, we saw gold go up to 250 and more during our Civil War, or rather paper money go down at that rate: so we now see silver coin at seventy-five because the commercial world finds its intrinsic value to be that and no more. In the case of the Rhode Island paper money as well as that of the United States in our Civil War, confidence and its natural attendant, credit, were wanting. The ability of the government to honor and redeem it was doubted. Whenever bankrupt Nations, States or Colonies have issued such paper it has met the fate which is the logical outcome of such environments.

The Southern Confederacy had a similar and more dismal experience. As Pollard states it, the Confederate Government had nothing, owned nothing; it had laid only inconsiderable taxes as a basis of sound credit. Its vast expenses were to be provided for by issues of paper money which were speedily on the road to depreciation.

In the second year of the late war the issues were greatly in excess of what was needed for a circulating medium. The treasury notes therefore fell rapidly—first 20 per cent. less than gold; in three months 50 per cent.; in December, 1862, 225 per cent.; 400 per cent. in the Spring of 1863; and so on thereafter, until, according to Mr. Secretary Menninger, 6,000 per cent. below gold was the last measure of its value at the Confederate Treasury. All the issues in excess of what was needed for currency must of necessity be translated into revenue, and poor stuff it proved to be. The distinction between currency and revenue was ignored. The

history of the Confederate issues is briefly that of all schemes of redundant currency—at first there comes a brilliant show of seeming prosperity. The cheat is soon seen in its true colors, and the inevitable end is universal bankruptcy and ruin. As late as August, 1862, Jefferson Davis in his message urged the Confederate Congress to issue yet more Treasury notes as he said "without fear of their depreciation." In this, Pollard and Alexander Stephens and other Southern critics declared he showed astounding financial ignorance. In his "letters on a regicide peace," Mr. Burke puts it that "the value of money must be judged like everything else, from its rate at market. To force that market, or any market, is of all things the most dangerous. For a small temporary benefit, the spring of all public credit might be relaxed forever."

"The moment" he continues "that shame or fear, or force are directly or indirectly applied to a loan, credit perishes."

THE CONSTITUTIONAL QUESTION.

That the right of a Court to test the validity of a Statute by the Constitution was questioned at this trial of the Judges. is not the least extraordinary feature of this remarkable trial. Let us trace briefly the further history of the controversy as to this now well settled right.

This question was discussed by Chief Justice Marshall with great vigor and clearness. The distinguished career of this eminent man as soldier, legislator, envoy, historian, statesman and Judge will never be forgotten at least by his countrymen. We are to quote him here as Judge. Among Judges he ranks with the few of the pioneer type, such as Holt and Mansfield, juridical lights of unquestioned greatness. To be a good Judge in the ordinary line of cases is no small matter, nor is it a light honor to achieve. Marshall lived at a time and held a position as Chief Justice which required him to do much more than the ordinary work of a Judge ;—such as to examine precedents authorities and adjudications. Acting in the early stage of our juridical history under a system of government new under the sun, to achieve success, he must construct law and establish and build up on solid foundations a system of jurisprudence, that should interpret the Constitution in the interest of the new and free institutions it was designed to protect.

Marshall demonstrated his fitness for such work in the legal mind he possessed; in his judicial cast; and in an intellectual grasp which enabled him to examine legal questions of National scope and interest with great power, comprehension, and thoroughness. By his wise and brilliant career he built up a monument that shall perpetuate his fame so long as civilization shall last.

The first Constitutional question that the Chief Justice had to consider and decide was the same that troubled the Rhode Island Legislature. The inquiry was as to the power and duty of the Court to set aside an act of Congress because of its repugnance to the Federal Constitution. This question arose in Marbury vs. Marbury, reported in first Cranch Reports, vol. 1, p. 158.

The facts stated briefly were as follows: Marbury was nominated by President Adams for Justice of the Peace, in the District of Columbia, and the nomination was confirmed by the Senate. The President signed the commission duly sealed, but the same had not been delivered to the appointee by Mr. Madison, the Secretary of State, when Mr. Jefferson succeeded Mr. Adams as President, Jefferson took the view that the appointment was incomplete and void, because the commission had not been delivered, and so countermanded its issue. Marbury petitioned for a Mandamus to require Madison to deliver it.

The question was raised whether it was competent under the Constitution for Congress to authorize a Mandamus in such cases as it had by Statute, and, if not, whether it was competent for the Court to declare the Act void on that ground. Jefferson contended that the validity of the commission, like that of a deed, depends upon its delivery. The Court thought otherwise, and Jefferson displayed some temper and assailed the decision as "an obiter dissertation of the Chief Justice and a perversion of law." He so characterized the decision, because the Court held that the act authorizing the mandamus was unconstitutional and void, and therefore could not find it relevant to discuss the validity of the commission in other respects.

Here we find the power and duty of the Court to declare an Act of Congress unconstitutional and void, asserted for the first time by the Supreme Court of the United States.

The Chief Justice, in delivering the opinion of the Court, said

in his clear and incisive way; "The question whether an Act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States, but happily, not of intricacy proportioned to its interest. If an Act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not a law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the Court must determine which of these conflicting rules govern the case. This is the very essence of judicial duty. If then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply." This refers to the original act.

Upon the same view, the Supreme Court declared an Act of the State of Georgia void in Fletcher vs. Peck. The State of Georgia had authorized by law a patent to issue for a tract of land in that State. The patent was granted and a subsequent legislature repealed the act. One of the points raised was that the repealing act was repugnant to the Constitution of Georgia, and therefore void and the State Court so held.

In this case the Chief Justice said: "The question whether a law be void for its repugnance to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which

that station imposed. But it is not upon a slight implication or vague conjecture, that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other. In this case the Court can perceive no such opposition."

The original act was therefore upheld, and the right of the Court to pass upon such a question was thus again asserted, but in this case it will be observed upon an alleged conflict between a Statute of a State and its Constitution, as well as the National Constitution.

In the celebrated case of Dartmouth College (1 Wheaton, vol. 4, p. 518) the power of the Court to set aside an Act of the Legislature of a State because of repugnance to the Constitution of the United States was again invoked.

Mr. Webster appeared in this case for the College of which he was a graduate. He was at this time—1818—in the prime of life, and made one of the best Constitutional arguments of his professional life. Dartmouth College began as a Charity School for the instruction of Indians in the Christian religion and was founded by Rev. Eleazer Wheelock, in 1754, first in Connecticut. Its success lead to the procurement of a charter from the English Crown. The charter created a perpetual corporation and was well adapted in its provisions to the wants of the College.

The College remained undisturbed in its progress until the year 1816, when a New Hampshire Legislature interfered with it chartered rights and passed an act radically changing the method of its government by its trustees. The regular trustees refused to be bound by the act, and brought an action of trover against one Woodford, who had possession of the College seal and other effects. In the State Courts the decision was against the College, and the case was taken by appeal to the Supreme Court of the United States, and placed in the hands of Mr. Webster for the College. The case was of far reaching importance. The contention by the College was that the New Hampshire act was a violation of the clause in the Constitution of the United States which provides that "No State shall pass any law impairing the obligation of con-

tracts." Up to this time the precise scope and meaning of this restraint had not deen determined by the Supreme Court. Thus the Court not only enforced this principle, but again asserted its power to pass upon the Constitutional validity of a Statute, State or National.

The College stood as we have seen upon a charter granted by the Crown of England before the Revolution. Was this charter in the nature of a contract that could not be interfered with in the sense of impairment by the State Legislature? This was the precise question decided in the affirmative by the Supreme Court thus reversing the State Court. The State Court had held that the College was a public corporation, and therefore its charter could be amended at the pleasure of the Legislature. Mr. Webster's effort was to overthrow this position and convince the Court that the College was a private eleemosynary corporation, and that the grant was therefore in the nature of a contract between the sovereign power and its founder which could not be Constitutionally impaired by State Legislation.

Mr. Webster contended that the decision would effect, not only public and private right generally, but also every institution of learning in the country, similarly endowed and founded,—that the fate of the College—his alma mater—was at stake. The case was decided in February, 1819. The principle that a charter of a private corporation is a contract and is under the protection of the Constitution was thus recgnized for the first time in the history of our Constitutional jurisprudence.

An eye witness of the great argument, the late Professor Goodrich, of Yale College, describes the scene and says the interest of the Judges in Mr. Webster's argument throughout was intense; especially when he exclaimed, addressing the Chief Justice, "this Sir, is my case. It is the case, not merely of that humble institution, it is the case of every College in our land. It is more. It is the case of every eleemosynary institution throughout our country—of all those great charities founded by the piety of our ancestors, to alleviate human misery, and scatter blessings along the pathway of life."

At another point, Mr. Webster said with much feeling, "It is Sir, as I said, a small College. And yet there are those who love

it." Upon recovering his composure and fixing his great dark keen eyes on the Chief Justice, Mr. Webster said in pathetic tones, "Sir, I know not how others may feel (glancing as Prof. Goodrich says, at the opponents of the College before him,) but for myself, when I see my Alma Mater surrounded like Cæsar in the Senate-house, by those who are reiterating stab after stab, I would not for this right hand, have her turn to me and say *et tu quoque mi fili! And thou too my son!* He sat down, and there was a death like stillness throughout the room for some moments. Every one seemed to be slowly recovering himself, and coming gradually back to his ordinary range of thought and feeling." To Mr. Webster belongs the honor of having procured the important principle involved in this case to be recognized and established in our system of Constitutional law. The leading case of McCulloch vs. the State of Maryland (11 Wheaton, p. 316), brought up the question whether a State had the power under the Constitution to tax a National Bank or a branch thereof. This question had become a political as well as a legal one. In 1816, Congress incorporated the Bank of the United States. A branch was established at Baltimore. Later, Maryland imposed a tax on all Banks and branches in that State not established by its own Legislature. The branch Bank refused to pay this tax, and judgment was rendered by the State Court against McCulloch, the cashier. The case came up on appeal in the United States Court, and its decision was looked for with great interest throughout the country. Eminent counsel appeared on both sides. For the Bank, Pinkney Wirt and Webster appeared; and, Luther Martin, Hopkinson and Walter Jones appeared for the State. Time will not permit a statement of all the grounds upon which the Chief Justice based his opinion that the Maryland act was unconstitutional.

I will cite one passage, however, from the opinion, as it is good sound doctrine, the corner stone of the Union, though enunciated as long ago as 1818. The Chief Justice in discussing the claim asserted by Maryland, that it could tax a National Bank, said "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring upon one government a power to control the Constitutional measures of

another, which other, with respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied. If the State may tax one instrument employed by the government in the execution of its power, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the Custom House; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of the government." Now comes the sound doctrine to which I refer, and which was opposed by Calhoun, in 1818, but was the inspiration of the loyal North and her gallant soldiers in 1861, when Fort Sumter was fired upon. This, said the Chief Justice, referring to the heresy "*was not intended by the American people. They did not design to make their government dependent on the States.*"

The doctrine of the South long upheld by Calhoun and others was that the National Government "is dependent upon the States."

The doctrine settled by the Civil War is that while for certain purposes the States have exclusive jurisdiction and are sovereign, yet touching all National purposes and especially the integrity of the Union and its powers, the Federal Government is supreme and not "dependant on the States."

In the case of Cohen vs. State of Virginia, one of the questions was whether the United States Court could revise the judgment of a State Court, in a case coming up under the Constitution, treaties of laws or the United States.

Cohen had been indicted in Norfolk, Virginia, for selling lottery tickets there, which were issued by the City of Washington, by authority of Congress.

In the course of the opinion sustaining the indictment in which such power to revise the judgment of a State Court was upheld, the Chief Justice again asserted sound National Union doctrine. He said that the United States, for many and most important purposes is a single nation has not *yet* been denied."

"These States are constituent parts of the United States. They are members of one great Empire, for some purposes sovereign, for some purposes subordinate."

From these citations, so emphatic, it would almost seem as if the

Chief Justice had as long ago as 1818 premonitions that the time might come in this country, as it did, when the Calhoun heresy would be asserted by men seeking the destruction of the Union.

Thus we see how the two heresies I have discussed came into prominence in the trial of the Rhode Island Judges. The first which asserted the possibility of maintaining as money an irresponsible paper issue, has had a sickly life with occassional spasms of revival such as we saw during our Civil War and later. Let us hope we have seen and heard the last of it. The other which boldly denied the power of any Court to pass upon the validity of a Statute upon Constitutional grounds, though stoutly insisted upon for years, has disappeared from the list of debatable questions. No man dealt this heresy more sturdy blows than Chief Justice Marshall.

The great importance of one department, or branch of the government, holding another in check is well illustrated by an anecdote once told by Dr. Francis Lieber to his law class, to the effect that Laboulye favored the bicarmal legislative system contrary to the French view. In a lecture delivered by him in Paris just before our Civil War, Laboulye related that one day Jefferson, who was fond of French ideas, attacked the system of two legislative houses in a conversation with Washington, when they were at tea together. Washington replied that Jefferson was doubtless much better informed than he was, but that he himself would abide by the English and American system. "You yourself," said the General, "have proved the excellence of the two houses this very moment." "I," said Jefferson, "how is that?" "You have," replied the General, "poured your hot tea from the cup into the saucer to cool it; it is the same we desire of the two houses."

Dr. Lieber adds, "There is not the least doubt in my mind that Laboulye said so; but whence has he the delectable anecdote? I would give much to know." So our Courts perform a like office when Legislative bodies, sometimes in hot excitement fail to observe Constitutional limitations.

The purpose of this paper has been accomplished if any of you who have heard it read, have been refreshed in your memory, or been helped to clearer understanding of the topics discussed, or

inspired with a firmer purpose to uphold the Constitution and the Union and stand for all things that make for sound currency, for law and order, and the preservation of public and private right.

In these days of chaotic views, when Anarchists, some not four years in the country, are denouncing all Constitutions, and are opposing Liberty regulated by law, and are hurling dynamite bombs at the Chicago Police because defenders of Liberty and Law, and are threatening the peace of the people in New York and elsewhere, it becomes us all, good citizens throughout the country, to earnestly renew our vows to stand by our free institutions—our "liberty regulated by law," to the end that there shall not be on the face of the earth a country where the people are more happy, or the rights of persons and property more securely protected.

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